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In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 311.

DIXIE FEED AND SEED COMPANY, INC. and JAMES LEE JOHNSON,

Appellants;

vs.

STANIFER G. BYRD,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF TENNESSEE.

BRIEF OPPOSING MOTION TO DISMISS APPEAL.

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TABLE OF CITATIONS.

Cases Cited.

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In *Hess vs. Pawloski*, 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091 (1926), a Massachusetts Statute authorizing substitute service of process on non-resident motorists was held constitutional because of the State's "power to regulate the use of its highways." In that case, the accident occurred on a highway, and the Court noted "under the statute the implied consent is limited to proceedings growing out of accidents or collisions *on a highway* in which the non-resident may be involved." (Emphasis added.)

In *Wuchter vs. Pizzutti*, 276 U. S. 13, 72 L. Ed. 446, 48 S. Ct. 259 (1928), although the principal issue was what notice had to be given to the non-resident motorist defendant, the Court said:

> "We quite agree, and, indeed, have so held in the Pawloski case, that the act of a non-resident in using

the highways of another State may properly be declared to be an agreement to accept service of summons in a suit *growing out of the use of the highway* * * *." (Emphasis added.)

The Court pointed out that this type service arose in the first place in a recognition that a State could require a non-resident, before allowing him to use the State highways, to take out a license and appoint a State Official as his agent "on whom process may be served in suits growing out of accidents *in such operation*." (Emphasis added.)

In neither of these cases was any question raised whether such substitute service would be constitutional if the accident out of which the suit arose occurred through operation of the vehicle on private property, not on the public highway. This question has been presented in several States since the *Hess* and *Wuchter* decisions, with varying results. Pages 4-6 of the motion to dismiss refer to decisions in several States holding that statutes authorizing substitute service in actions arising out of accidents where the vehicles were on private property were constitutional. On the other hand, such cases as *Brauer Machine & Supply Company vs. Park Hill Trust Company*, 383 Ill. 569, 50 N. E. (2d) 836 (1943), *Finn vs. Schreiber*, 35 F. Supp. 638 (D. C. N. Y., 1940), *Harris vs. Hanson*, 75 F. Supp. 481 (D. C. Idaho, 1940), and other cases in the annotation beginning at 73 *A. L. R.* (2d) 1351 have held that statutes attempting to authorize substitute service under these circumstances would be unconstitutional. Typifying this confusion among the States is the Tennessee case of *Bertrand vs. Wilds*, cited at page 4 in the motion to dismiss. In the opinion, the Court said that the place where the accident occurred was a public highway and that "It must be conceded that the statute contem-

plated an accident upon some highway of the State." On petition to rehear, the Court turned 180 and said the statute would apply "to the operation of such vehicles on private property." This statement was unnecessary dictum, but just serves to illustrate that not only have the States disagreed among themselves on the subject, but Tennessee has even disagreed with itself within the same opinion in the same case. The Supreme Court of the United States has not spoken on this particular subject except indirectly in the *Hess* and *Wuchter* cases. It is submitted that this constitutional question upon which the State Courts have disagreed, and which is directly involved in this appeal, is a substantial federal question which deserves consideration by this Court.

If the State's police power over use of its highways forms the basis of the State's right to authorize substitute service—as the *Hess* opinion said—then where is the basis for authorization for substitute service when the highway is not being used at the time of the accident? If the use of the highway by a vehicle at the time of the accident is not a necessary factor, then a statute would be constitutional which provided that a non-resident's use of the State's highways constituted an appointment of the Secretary of State as such non-resident's agent for service of process in *any* suit brought in such State against such non-resident by anyone. If the accident doesn't have to occur on the highway, then it shouldn't even have to occur within the State. If the use of the highway at the time of the accident is not the key factor, then it wouldn't make any difference whether it was a suit for damages arising out of an automobile accident or one for damages from assault, or libel, or for breach of contract. In other words, if the requirement of use of the highway at the time of the accident is eliminated, then the only factor which

created reason for the rule at the beginning has disappeared.

It's true that the truck in the present case would have been on a public highway if it had been just a few feet farther West and that service could have been secured through the Secretary of State under those circumstances. It is just such close cases as this which lead to the creation of bad law. Such phrases as "artificial and unreasonable distinction" are used to justify stepping just across the line marked by law. Once that line has been breached, then the beginning has been laid for the ultimate disappearance of the principle of law which created the line in the first place. Thus, if the public highway - private property distinction is a valid vital test, then it can't make any difference whether the vehicle is three feet on private property or three miles.

Now to answer the contentions raised in the motion to dismiss. Constitutionality of the statute was the real issue in *Brauer Machine & Supply Company vs. Park Hill Truck Company*, 383 Ill. 560, 50 N. E. (2d) 836 (1943). Whether or not constitutionality had to be an issue is immaterial; the point is that the Illinois Supreme Court treated it as the issue.

Its similarity to the present case is startling. A truck of the appellee traveled from Oklahoma to Illinois to deliver a steel structure, and while unloading on private premises, adjacent to the highway, an injury was caused. This suit was instituted to recover for those injuries, and service through the Secretary of State was quashed. This was affirmed on appeal.

Twice the Supreme Court of Illinois emphasized that application of the statute where there was no causative force between operation on the highway and the injury would violate the Constitution of the United States. The

Court rejected the argument that because the unloading had to be done to complete the seller's obligation to the buyer, this made the unloading an incident to the operation on the highway. The Court said that though this was the contract between the parties, it had no bearing on the application of the statute. It rejected also the argument that this holding would limit the operation of the statute to the area within the boundaries of the highways, saying:

> "If the injury or damage claimed results from the use and operation of a motor vehicle on the highway, then the place where the injury or damage to the person or property of another actually occurred would be wholly immaterial. It is only necessary that the causative force originate in the use or operation of the vehicle on the highway * * *."

The motion to dismiss, page 3, mentions that the *Hess* case contained no reference to the use of a motor vehicle on private property in connection with a substitute service statute. This is the very point appellants stress. The *Hess* decision, at least inferentially says that the only basis for jurisdiction arises out of the police power over the highways and thus logically indicates that unless the accident occurs on the highways there is no basis for this artificial type service of process. Appellee cites 8 *Am. Jur.* 2d, Automobiles and Highway Traffic, Sec. 862. That section in turn refers to 73 *A. L. R.* 2d 1351, et seq. Both of these texts reveal the spread of authority among the various States as to the constitutionality of allowing service of process where the accident occurred on private property. It is this very diversity of opinion which appellants submit should be resolved by the only tribunal which can utter the decisive words.

Sipe vs. Moyers is cited in appellee's brief, page 3. This Court employed the phrase "artificial and unreason-

able distinction" to say that the statute can't apply to injuries on private property but that it can apply to injuries on public highways. This is the phrase normally employed in a close case to justify stepping across the line. As we pointed out above, if there is to be a law, somewhere there must be a line, and it can always be said that those things lying close on each side of the line can be distinguished only "artificially and unreasonably."

Appellee's motion, page 3, footnote 1, refers to the fact that the Massachusetts statute has been amended to attempt to reach accidents on private property. This is certainly no authority in support of the proposition that such an amendment is constitutional. This would be the same thing as saying that the adoption of any statute automatically certifies it as constitutional.

Appellee's motion, page 4, indicates that the *Wuchter* case did not involve the issue in the present case. That is true, but the language in the *Wuchter* case certainly affirmed the belief that that Court contemplated application of the statutes only to accidents on public highways. Furthermore, it is to be noted that the New Jersey statute involved in that case was like the Tennessee statute—it purported to apply to "any accident or collision occurring within the State in which * * * such motor vehicle is involved," not just accidents occurring on public highways. Nonetheless the language of the opinion quite clearly contemplated application only to accidents on public highways.

Appellee's brief, page 6, asserts that since the State has police regulatory power over private property for some purposes this gives the State the right to subject nonresidents to substitute service of process for any actions which may occur on such private property. This was certainly not the rationale of the *Hess* case. Nor is it logical.

Restatement of the principle espoused by appellee reveals its incongruity: The State's power to prescribe building regulations governing structures on private property gives the State the power to subject a non-resident motorist operating his vehicle on such private property to substitute service of process through the Secretary of State. The complete absence of any relationship between the purpose of the State's power and the activity creating the cause of action is the thing which makes this hypothesis submitted by appellee false. If this necessary relationship between the power to regulate and activities being regulated is eliminated, then the law on the subject, having no logical, reasonable basis, must necessarily become undisciplined and chaotic.

The *International Shoe* case and *Olberding* case are concerned with the question of corporate presence, which is not involved in the principal question in this case. Here our question is whether or not an individual can be subjected to service under the police power over highways when the accident doesn't occur on a highway.

It is respectfully submitted that a substantial federal question is presented and that this is a proper case for the notation of probable jurisdiction.

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